



California Corporate & Securities Law

More On Say-On-Pay Voting

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In yesterday's post, I make the point that the Dodd-Frank Act requires issuers to include a resolution in their proxy statement regarding the frequency of say-on-pay advisory votes. Because the vote on this resolution is advisory only, some issuers appear to be taking the position that they don't have to apply the "normal" rules to determine whether the resolution is adopted. Moreover, it is very tempting to invoke a plurality voting rule (*i.e.*, the choice that receives the most vote wins) because the shareholders must be allowed to instruct their proxies to vote on 1, 2, or 3 years or abstain.

However, the fact that a resolution is nonbinding does not make the question of whether it passes irrelevant. Just ask any proponent of a nonbinding shareholder resolution if they care whether the resolution passes. Furthermore, the Securities and Exchange Commission's proxy rules require issuers to disclose the vote required for approval of matters presented.

I do recognize that when three alternatives are presented, a majority vote requirement may not be the most informative. If a corporation thinks that some other vote (*e.g.*, plurality) provides a better sense of shareholder sentiment, the corporation can (subject to state law) amend the voting rule to be applied to this type of resolution.

If the corporation doesn't (or can't under applicable law) amend its voting rule, I believe it is still possible for the Board to consider the manner in which votes are cast. In other words, there are two different questions. First, did the shareholders as a matter of corporate law adopt the resolution on the frequency of shareholder advisory votes on executive compensation? Second, how should the Board assess the votes cast with respect to the resolution? This second assessment can be made regardless of whether the shareholders have adopted the resolution as a matter of corporate law.

Below is an example of this approach.^[1]

In accordance with the recently enacted legislation mentioned above, we are required to include in this proxy statement the opportunity for our stockholders to cast an advisory (non-binding) vote on a resolution as to

Please contact **[Keith Paul Bishop](#)** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>

whether the Say-on-Pay vote should occur once every one, two or three years. Accordingly, the following resolution will be submitted for stockholder approval at the annual meeting:

“RESOLVED, that the Company hold a stockholder advisory vote to approve the compensation of the Company’s named executive officers as disclosed pursuant to Item 402 of Regulation S-K with a frequency of once every one year, two years or three years, whichever receives the highest number of votes cast with respect to this resolution.”

Approval of the foregoing resolution by the stockholders requires the affirmative vote of a majority of the voting power of all outstanding shares of our common stock present or represented by proxy at the annual meeting and entitled to be voted on the proposal voting in favor of one of the three time periods presented. Thus, abstentions will have the effect of a vote against adoption of the resolution. Broker non-votes will be considered present but not entitled to vote and will not have the effect of a vote against adoption of the resolution. If the resolution is not adopted by the required vote of the stockholders, the Board will evaluate the votes cast for each time period presented and will [describe whether plurality, Borda count or some other methodology will be applied].

[1] This example assumes that action by the shareholders requires the affirmative vote of a majority of the shares present and entitled to vote. Depending on state law and a corporation’s charter provisions, the required vote for shareholder action may be different. Note also that this blog is intended to present ideas and commentary not legal advice, see the Terms of Use.

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